IN THE SUPREME COURT OF FLORIDA
CASE NO. 71,554

CAPE PUBLICATIONS, INC.,
VINCE SPEZZANO and JERE MAUPIN,
Petitioners,
v.
PHILLIP HITCHNER and
BARBARA HITCHNER, his wife,
Respondents.

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF THE TIMES PUBLISHING COMPANY, THE MIAMI HERALD PUBLISHING COMPANY, SENTINEL COMMUNICATIONS COMPANY, THE TRIBUNE COMPANY, NEWS *AND* SUN SENTINEL COMPANY, MIAMI DAILY NEWS, INC., NEWS-PRESS PUBLISHING COMPANY, PENSACOLA NEWS-JOURNAL, INC., SCRIPPS HOWARD, SCRIPPS HOWARD BROADCASTING COMPANY, FERNANDINA BEACH NEWS-LEADER, INC., GAINESVILLE *SUN* PUBLISHING COMPANY, LAKE CITY REPORTER, INC., LAKELAND LEDGER PUBLISHING CORPORATION, OCALA STAR-BANNER CORPORATION, SEBRING NEWS-SUN, INC., THE LEESBURG *DAILY* COMMERCIAL, INC., THE PALATKA *DAILY* NEWS, INC., THE SARASOTA HERALD-TRIBUNE COMPANY, THE MARCO ISLAND EAGLE, THE PALATKA DAILY NEWS, INC., THE SEBRING NEWS-SUN, INC., AND THE FLORIDA STAR AS AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Statutes

Constitutional Provisions

Other Authority

STATEMENT OF THE CASE AND FACTS

On January 9, 1981, Phillip and Barbara Hitchner were acquitted in open court of the charge of aggravated child abuse. The charges stemmed from a November 23, 1980 incident in which Phillip Hitchner and his brother forcibly restrained the Hitchners' 9-year-old daughter while Mrs. Hitchner, the child's stepmother, scrubbed the child's buttocks and anus with a steel wool cleaning pad.

The trial judge entered a directed verdict of acquittal. Subsequently, Jere Maupin, a reporter for the Today newspaper, examined the criminal court's file in the clerk's office, and interviewed the prosecutor. At the direction of that assistant state attorney, a secretary gave the reporter the prosecution's case file. That file contained, among other items, a Health *and* Rehabilitative Services ("HRS") predispositional report, the sheriff's case repit, and the transcript of an interview with the child.

Thereafter, the Tcday newspaper published a story concerning the Hitchners' acquittal. The story contained statements, not disclosed at trial, taken from the HRS predispositional report, the sheriff's report, and the child's interview.

The Hitchners sued the reporter and Cape Publications claiming that the newspaper, its publisher, and its reprter invaded their privacy by publicly disclosing embarrassing private fads. The Hitchners alleged that the reports and interview contained in the state attorney's file were confidential and disclosed in violation of Section 827.07(15), Fla. Stat. (1980).[1] Section 827.07 exempted from Public Records Act disclosure certain child abuse records, and made disclosure of *such* information a second *degree* misdemeanor. *(See* Appendix B) The Hitchners moved for partial summary judgment on stipulated facts arguing that the newspaper and its employees were liable to the Hitchners for invasion of privacy as a matter of law based on Section 827.07(15).

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[1] Section 827.07(15) does not appear in the 1980 volume. However, it appears in the 1979 volume and is unchanged in the 1981 volume, cited by the court below.

The trial Court granted partial summary judgment in favor of the Hitchners on the issue of liability. The Court held that the publication of the contents of records made confidential by Section 827.07(15) was negligent as a matter of law, and further found that the statute was valid and *conferred* on the Hitchners' cause of action in tort.

On appeal, the Fifth District Court of Appeal affirmed the trial court's order. The court ruled that the HRS report, the sheriff's report, and the interview transcript were confidential under *Section* 827.07(15). The court construed the statute to make the information in those reports private as a matter of law, and therefore the newspaper was liable to the Hitchners as a matter of law for publishing "statutorily protected private facts" irrespective of intent, fault, or the newsworthiness of the article. The court specifically rejected Cape Publications' argument that Section *827.07* was unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

There are three jurisdictional bases to review the Fifth District Court of Appeal's decision. That opinion expressly and directly conflicts with a decision of another district court; it conflicts with decisions of the Florida Supreme *Court on* the same questions of law; and it expressly and erroneously construes a provision of the United States Constitution. *Art.* V, Section 3(b)(3), Fla. Const.

This court should exercise its discretion to review this *case* because the Fifth District's decision is seriously flawed. It imposes strict liability for publication of completely truthful information, of serious concern to the public, provided by a government officer. In addition, examination of the statute's history shows that the legislature did not intend for it to provide a civil remedy to persons in the Hitchners' position.

ARGUMENT

I.

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER DISTRICT COURTS ON THE SAME QUESTION OF LAW.

The Fifth District's determination that the fads published were "private as a matter of law" expressly and directly conflicts with the decision of the Second District in Doe v. Sarasota-Bradenton Florida Television Co., 436 So.2d 328 (Fla. 2d DCA 1983). The Doe court upheld the dismissal of an action for invasion of privacy that was based on a statute making it a crime to print the name of a rape victim. As here, the state in Doe violated its duty to keep the victim's name and photo confidential. But the Second District rejected liabilty on the authority of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), which held that the First Amendment prohibits the punishment of a newspaper, through an invasion of privacy action, for "pure expression" -- the accurate publication of embarrassing facts already open to public view. The *court* in Cox explicitly placed upon the custodian of the records the responsibility to prevent exposure of private information. Once information is revealed to the press, even if in violation of a statute, the information is public. 420 U.S. at 496.[2]

In addition, the Fifth District's decision that the First and Fourteenth Amendments do not protect the publication of truthful, lawfully obtained facts in an invasion of privacy action, directly and expressly conflicts with the established case law of this state that the First Amendment protects the publication of truthful information derived from government records, and publication of information on subjects of public interest. In Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), cert. den. 431 U.S. 930 (1977), the plaintiff sued based on the newspaper's publication of photos and a story detailing the death of her young daughter in a house fire. In that case, the

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[2] *See* also Stevenson v. Nottingham, 48 Fla. Supp. 10 (Fla. 6th Cir. 1978)(2d DCA affirmed trial court's dismissal on First Amendment grounds of drug program enrollee's invasion of privacy action based on Section 397.096, Fla. Stat. (1977), which made confidential records maintained by drug treatment programs.)

police and fire officials allowed the news reporters to enter and view the house and to take photos without restriction. Applying First Amendment analysis, this Court left undisturbed the dismissal of the plaintiff's count for publication of embarrassing and painful private fads and reversed the First District's holding that physical intrusion onto the plaintiff's property fell within the trespass branch of the invasion of privacy tort. In the portion of the lower Court's ruling left undisturbed, the court dismissed a claim of invasion of privacy by publication of embarrassing private facts since the publication concerned matters of general and legitimate public interest. In the case at bar, the reporter was similarly allowed access to information, eventually published, by an officer of the state. Information about consequences of mistreatment of children, and the justice system's response thereto is obviously of legitimate public interest to the citizens of this state.

Similarly, the court's holding below expressly and directly conflicts with this Court's holding in Tribune Co. V. Huffstetler, 489 So.2d 722 (Fla. 1986). There, this Court reversed the conviction of a reporter for contempt where he had published informaticm about a canplaint before the Florida Ethics Commission obtained from a confidential source which he refused to reveal to a state attorney investi'gating a possible violation of Section 112.317(6), Fla. Stat. (1981), which prohibited the disclosure of either one's own intent to file an ethics canplaint or the existence of a canplaint already filed with the commission. This court's opinion makes clear that the private interest in reputation of those accused of ethics violations, which the statute sought to protect, was subordinate to the protections afforded by the First Amendment. Likewise, in this case, in the course of regular newsgathering, the reporter obtained information, specifically deemed confidential by a state statute, which purports to protect the reputations and feelings of those accused of abusing children.[3] Under Huffstetler, newsgathering directed to such information is

[3]Note that the child is not a party to the lawsuit. Thus, the suit seeks merely to vindicate the hurt feelings and reputation of the stepmother and father who scrubbed their child's anus and buttocks with steel wool.

protected by the First Amendment values which outweigh any private reputational interest. See also Jacova v. Southern Radio and Television Co., 83 So.2d 34 (Fla. 1955); Stafford v. Hayes, 327 So.2d 871 (Fla. 1st DCA 1976); Cape Publications, Inc. V. Bridges, 423 So.2d 426 (Fla. 5th DCA 1982), rev. den., 431 So.2d 988 (Fla. 1982), cert. den., 464 U.S. 893, 104 S.Ct. 239 (1983).

The Fifth District's decision expressly upholding the constitutionality of Section 827.07, Fla. Stat., also expressly and directly conflicts with this Court's holding in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982). There, this court held that a statute making criminal pblication of the name of an unindicted wiretap subject was an unconstitutional prior restraint on the press under the First Amendment. The statute on which the Fifth District based its holding that Cape Publications published facts "private as a matter of law" is indistinguishable. Both statutes imposed a blanket ban on and penalty for the publication of information specified as confidential with none of the procedural safeguards, including prior notice and a hearing in which the competing interests at stake may be balanced, that this Court has held are required in such cases. See Gardner, 413 So.2d at 12.

II.

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND ERRONEOUSLY DECLARES VALID SECTION 827.07(15) FLORIDA STATUTES (1981).

The Fifth District construed Section 827.07 to make confidential, and impose criminal and civil liablity for the publication of, any information contained in records of child abuse or neglect, irrespective of whether the information is truthful and obtained by innocent means.[4] In its opinion, the Fifth District Court stated, "[T]he Statute is not constitutionally infirm because it does not infringe upon the freedom of press and publication.. .." On the contrary, this court and the United states Supreme Court have struck down statutes virtually indistinguishable as applied on the grounds that the laws did

[4]These amici adopt the brief of the Florida Press Association, et al. arguing that the statute was not intended to restrain publication of information about child abuse cases.

impermissably infringe on First Amendment rights. In Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), cert. den. 459 U.S. 865 (1983), this Court struck down Section 934.091, Fla. Stat. (1977). The court below neither distinguished nor cited Gardner in its opinion.

In Gardner, this Court relied on a number of United States Supreme Court decisions striking down statutes, similar to the one in *this* case, which imposed civil or criminal penalties for publication of true, lawfully obtained information. In Landmark Communi'cations, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), the Court struck down as an unconstitutional prior restraint a statute which made it a crime to divulge information regarding confidential proceedings before a state judicial review commission authorized to hear complaints about judges. The *Court* ruled that the First Amendment would not permit *the* punishment of a newspaper for publishing truthful information regarding what *transpired during* the proceedings, even though a source had "leaked" that information to the press.

Likewise, in Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), the Court invalidated a West Virginia statute which made it a crime for a newspaper to publish, without court permission, the name of any youth charged as a jwenile offender. There, the newspaper had obtained the name from police. Also, in Cox Broadcasting Corp. v. Cohn, 420 U.S 469, 95 S.Ct. 1029 (1975), the United States Supreme Court found unconstitutional a Georgia statute which made it a crime to publish the name or identity of a rape victim in circumstances indistinguishable from those at bar. There, a father filed a private-facts invasion of privacy action against a television station which broadcast his deceased daughter's name, identifying her as a victim of rape. The reporter had obtained the name of the victim from the criminal court file provided to him by the clerk. The lower courts, as in this *case*, granted summary judgment to the plaintiff based on the statute. *However, the* Supreme *Court* reversed and held that it is constitutionally impermissible to impose civil liability for the accurate publication of truthful information obtained from

records containing the name of the victim which were handed over to the reporter by the clerk without restriction, notwithstanding that the name was made confidential by the statute. See also Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 97 S.Ct. 1045 (1977)(Court struck down order prohibiting publication of name and photo of juvenile murder defendant in connection with story on hearing even though statute provided for closed juvenile hearings).

Clearly, under the case law as decided by this Court and the United States Supreme Court, Section 827.07 is serously constitutionally infirm. The interests of parents, who engage in extreme behavior, in protecting their reputations and privacy certainly can no more justify the imposition of absolute and autunatic sanctions irrespective of fault or First Amendment concerns than could the interests of judges in protecting their reputations (Landmark), or criminal defendants in a fair trial. Moreover, protecting pure political speech, i.e., criticism of the government's criminal justice system, is a core First Amendment concern. Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791 (1976). This Court has jurisdiction to correct the egregious error of the Fifth District Court in expressly upholding the validity of this statute.

III.

THE DECISION OF THE FIFTH DISTRICT EXPRESSLY AND ERRONEOUSLY CONSTRUES PROVISIONS OF THE FEDERAL CONSTITUTION.

In its opinion, rejecting Cape Publications' defenses and holding the newspaper strictly liable to the Plaintiffs for publishing completely truthful and accurate information provided to its reporter by the assistant state attorney, the court below ruled that the First and Fourteenth Amendment guarantees do not protect the press when sued for invasion of privacy. This construction of the federal constitution is contrary to the United States Supreme Court. and Florida case law. As fully explained above, the United States Supreme Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), held that the First and Fourteenth Amendments prohibit the imposition of criminal or civil liability upon the press for accurately publishing truthful information obtained from

documents made public. See also, Doe v. Sarasota-Bradenton Florida Television Co., 436 So.2d 328 (Fla. 2d DCA 1983).

The rights of free speech and press are so central to the maintenance of our democracy that the press enjoys First Amendment protection even where the reports it publishes are false. The United States Supreme Court has held that it is constitutionally impermissible for states to impose liability without fault even when a private person seeks redress for the publication of defamatory falsehoods. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974). See also, Tribune Co. v. Levin, 426 So.2d 45 (Fla. 2d DCA 1982).

Nevertheless, in the case at bar, the Fifth District imposed strict liability on the press, in absence of any fault on its part, for injury alleged to have been caused by publication of the truth. This construction of the federal constitution is a dangerous precedent and a serious misconstruction of the First Amendment which this Court now has the opportunity to correct by accepting jurisdiction to hear this case on the merits.

REASONS FOR GRANTING REVIEW

The decision of the Fifth District in this case presents a dangerous misapprehension and misapplication of the law which in effect imposes on the press strict liability, completely irrespective of fault, for the accurate publication of true facts obtained from the government in the ordinary course of newsgathering.

In fact, it is clear that the legislature did not intend Section 827.07 (1981) to provide a civil remedy to persons in the Hitchners' position. Chapter 827 of the Florida Statutes formerly contained a provision making those who disclosed information from child abuse cases personally liable in damages to persons injured by the disclosure. (See Appendix B) However, that provision was repealed in 1979, well before the publication here complained of. The provision imposing criminal sanctions for disclosure of confidential information about a child abuse case was likewise eliminated and no longer appears in the statutes.

Section 827.07 is one of approximately 310 exceptions to the Public Records

Act sprinkled throughout the Florida Statutes. See Attorney General's Government in the Sunshine Manual at 89-131 (1987 Ed.).[5] The Fifth DCA's decision would convert each of these into a civil cause of action in favor of persons about whom "confidential" information is *exposed* by the press. The legislature did not intend to create 310 classes of "statutorally protected private facts," charging *every* speaker in the state of Florida with the duty of remaining silent on such subjects as reports fran wholesale dealers of saltwater products and reports of the quantity, quality or disposition of milk products. Nor could the legislature have intended to subject each speaker in Florida with the duty of knowing each of these 310 forbidden topics of speech,[6] subjecting the citizens of this State to the risk of strict liability in damages for inadvertent *speech* or publication about these matters where the information is lawfully obtained fran government officials. The legislature would not intend to open the flood-gate of tort litigation which follows fran the decision of the Fifth District in this case, nor should this Court sanction such an imposition on our judicial system.

It would be even more alarming to assume the legislature did intend to forbid public discussion about 310 "statutorily protected private facts." The clear result of the Fifth District's opinion is that the legislature can effectively enact a prior restraint against *speech* and press publication in broad subject matter categories by a legislative declaration that such facts are private. Never before has such broad power of the legislature to control *speech* been recognized or accepted before the courts.

Furthermore, the language of the statute does not indicate that it is intended to apply to the press. Rather, the statute properly places u p the offices in possession of the confidential information the duty to keep it confidential.

This decision is a serious encroachment on the freedom of the press to

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5 See Appendix C.

6 Indeed, it is doubtful that *Section* 827.07 provides sufficient notice to meet the requirements of due process.

publish truthful information as guaranteed by the Florida and United States Constitutions. The press cannot be required to withhold truthful information provided by the government about which the public is legitimately concerned. As the court stated in Cox, "The commission of crime and resulting prosecutions are without question events of legitimate public concern which the press bears the responsibility to report." 420 U.S. at 492.

The decision has created doubt and apprehension among members of the press in this state who now face the prospect of Strict liability for the accurate publication of information provided by the government. This fear and confusion necessarily chills free speech concerning the operation of our system of government, speech at the core of First Amendment freedoms.

CONCLUSION

For the forgoing reasons, this Court should exercise its discretionary power to review the decision of the Fifth District Court of Appeal in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to William E. Weller, Esquire, 101 N. Atlantic Avenue, P.O. Box 1255, Cocoa Beach, FL 32391 this 14th day of December, 1987.

George K. Rahdert, Esquire